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In The
Supreme Court of the United States

OCTOBER TERM, 1941

NO. 28

CLOVERLEAF BUTTER COMPANY,
A CORPORATION,

Petitioner,

vs.

HAYGOOD PATERSON, as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,

Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS

THOMAS S. LAWSON,
Attorney General of Alabama

WILLIAM H. LOEB,
Assistant Attorney General

Counsel for Respondents.

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SUPPLEMENTAL ARGUMENT

Since the preparation and filing of the original brief for respondents in this cause, there has come to our attention Opinion No. 9860 of the Solicitor of the United States Department of Agriculture, dated December 6, 1920, regarding the scope and effect of the Renovated Butter Act of 1902 (32 Stat. 196), as amended by the act of August 10, 1912 (37 Stat. 273).

In view of the clearly expressed opinion of this Court that "much weight is to be given to the practical interpretation of the Act by the Federal Department", we feel that this opinion of the Solicitor of the United States Department of Agriculture, (the Department upon which is imposed, in part, the duty of administering the Renovated Butter Law) is of such importance to a decision of the matters here presented as to warrant its being specially called to the attention of this Court.

We have copied the opinion at length into Appendix B (pp. 7-18) and the Court is respectfully referred thereto. Also set forth in Appendix A (pp 5, 6) is a copy of a letter dated November 6, 1941, received from Hon. Mastin G. White, Solicitor of The United States Department of Agriculture, in which is stated that the solicitor knows of "no later opinion by this office holding a contrary view."

The Solicitor's opinion supports in full the conclusion reached by the respondents that the Renovated Butter Act of 1902 and its complementary statutes are so restricted in scope and effect as to preclude every inference of supersedure of state action. The following conclusions reached by the Solicitor in 1920 will suffice to illustrate the tenor of the opinion:

"In fact, the only effective control over these factories which is given to the Secretary of Agriculture is to require the marking of the product so as to identify it as process or renovated butter, and to confiscate such quantities of the finished product of the factories as may be found to be deleterious to health or unwholesome. And the only control given the Commissioner of Internal Revenue is such as is necessary for the collection of the factory, and per pound taxes provided by the acts hereinbefore referred to."

We respectfully submit that this administrative ruling, uniformly followed since its rendition, finds legislative approval in the reenactment, on February 10, 1939 (53 Stat. 254; 26 Internal Revenue Code 2325) of the statutory provision to which it related.

Upon this additional authority, we respectfully reiterate that neither Alabama's law nor the actions of Alabama's officers "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Upon this additional authority, also, do we renew our respectful insistence that the courts below correctly decided the

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[1] *U. S. v. Dakota-Montana Oil Co.*, 288 U. S. 459, 466
Johnson v. Manhattan R. Co., 289 U. S. 479, 500

issues and properly denied the injunction sought by petitioner.

Respectfully submitted,

THOS. S. LAWSON,
Attorney General of Alabama.

WILLIAM H. LOEB,
Assistant Attorney General.

APPENDIX A

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

Nov. 6, 1941.

Hon. Thomas S. Lawson
Attorney General, State of Alabama
Montgomery, Alabama

Attention: Mr. William H. Loeb
Assistant Attorney General

Dear Mr. Lawson:

This is in reply to your letter of October 27, 1941, addressed to Mr. Leonard Calhoun, Acting General Counsel, Federal Security Agency, a copy of which letter was referred to this office for reply, concerning Section 5 of the Act of May 9, 1902 (32 Stat. 196), as reenacted on February 10, 1939 (53 Stat. 254; 26 Internal Revenue Code 2325), known as the Process or Renovated Butter Act, and the Act of August 10, 1912 (37 Stat. 269, 273), as to its application in the enforcement of the Process or Renovated Butter Act.

A copy of Solicitor's Opinion No. 9860, dated December 6, 1920, regarding the effect of the Act of

August 10, 1912, upon the enforcement of the Process or Renovated Butter Act, is enclosed as requested in your letter. *I know of no later opinion by this office holding a contrary view.*

Sincerely yours,

(Signed) MASTIN G. WHITE,
Solicitor.

Enclosure

APPENDIX B

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SOLICITOR
WASHINGTON, D. C.

Dec. 6, 1920.

BUREAU OF ANIMAL INDUSTRY:

Reference is made to the attached file, which is returned herewith, consisting of a letter dated August 9, 1920, to Mr. Charles M. Shank, the proprietor of a renovated butter factory at Middletown, Md., and a proposed letter to the same person, dated September 30, 1920, making recommendations for the improvement of the sanitary conditions of such factory. The sixth paragraph of the last named letter states:

> Another inspection will be made about the first of November, and unless your plant has been put into a satisfactory condition, a recommendation will be made to cancel your license, and a request be made that it not be renewed until such time as the plant meets the sanitary requirements of the law.

You are advised that process or renovated butter factories are not required to, and do not, in fact, operate under any license, either from the Secretary

of Agriculture or the Commissioner of Internal Revenue, but are merely required to pay a special tax, the payment of which authorizes the operation of the factory as a matter of right. Therefore, neither the Secretary of Agriculture nor the Commissioner of Internal Revenue could revoke the license of this factory, as suggested in your letter.

To determine whether there may not be some method of proceeding whereby the practices and conditions described in your letter may be abated or, in case of their continuance, the product of such factories be denied entry into interstate commerce, I have made a careful examination of the various Acts of Congress and decisions of the courts relating to the conduct of these factories, which acts and decisions, insofar as they are pertinent to this inquiry, are discussed below.

The basic enactment providing for sanitary regulation of these factories appears to be the Act of May 9, 1902 (32 Stat., 196), by the fifth section of which it is provided:

> And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. * * * The Secre-

tary of Agriculture shall make all needful regulations for carrying this section into effect, and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and the condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process or renovated butter are deleterious to health or unwholesome in the finished product. And in case such deleterious or unwholesome materials are found to be used in a product intended for exportation or shipment into other States or in course of exportation or shipment he shall have power to confiscate the same. Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, etc.

This section also applies to process or renovated butter factories all parts of the Act of August 30, 1890 (26 Stat. 414), and of the Act of March 3, 1891 (26 Stat. 1089) and the amendment thereto of March 2, 1895 (28 Stat. 731), which are applicable to the subjects and purposes described in the said section. But, inasmuch as the acts and amendments above referred to relate only to the ante mortem examination of certain meat animals intended for slaughter, it would appear that there are, in reality, no parts of these acts, or any of them, which can be applied to process or renovated butter or the manufacture of the same. In other words, the acts and

amendments referred to contain no provisions for the sanitary inspection of the places of slaughter of the animals described in said acts, nor of the places of manufacture of the meat products of such animals.

It is true that the fifth section of the Act of May 9, 1902, as above quoted, provides:

> Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor, etc;

But this section requires nothing other than the placing of identification marks upon packages containing the finished product, to be done, or refrained from by any person engaged in the manufacture of process or renovated butter, so it would seem that none of the sanitary provisions of the act can be violated by such persons.

To supply the deficiencies of the laws relating to this subject, it was provided by the Act of Congress of August 10, 1912, Chapter 284 (37 Stat. 273):

> That the sanitary provisions for slaughtering, meat canning or similar establishments, as set forth in the Act of June 30, 1906 (34 Stat. 676) are hereby extended to cover renovated butter factories as defined in the Act of May 9, 1902 (34 Stat. 196) under such regulations as the Secretary of Agriculture may prescribe.

The sanitary provisions of the Act of June 30, 1906 (34 Stat. 676), known as the Meat Inspection Amendment, in so far as they relate to the conduct of factories in which any product is prepared, are contained in Section 6 of that Act, which provides:

> The Secretary of Agriculture shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat canning, salting, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate or foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered unclean, unsound, unhealthful, unwholesome, or otherwise unfit for human food, he shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "Inspected and Passed".

and in Section 19 of the same act, which, in so far as it is germane to this inquiry, provides:

> That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection * * * of the sanitary con-

ditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag, or label any carcass or any part thereof, or any meat food product therefrom, prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found * * * to have been prepared under proper sanitary conditions, hereinbefore provided for.

It is provided by Section 8 of the Meat Inspection Amendment that:

No person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to any place under the jurisdiction of the United States, or to any foreign country, any carcasses or parts thereof, meat, or meat food products thereof which have not been inspected, examined, and marked as "Inspected and Passed," in accordance with the terms of this act and with the rules and regulations prescribed by the Secretary of Agriculture.

It appears, therefore, that under the sanitary provisions of the Meat Inspection Amendment, in so far as they relate to factories and the conduct thereof, the only penalty provided for violation of the sani-

tary requirements is that the products of such factories can not be marked "Inspected and Passed" and, being so unmarked, they can not, under Section 6 of the Act, be lawfully transported, or offered for transportation in interstate commerce.

It would seem, therefore, that, under the Meat Inspection Amendment, the violation of law consists in transporting, or offering for transportation in interstate commerce meats or meat food products which have not been marked as "Inspected and Passed," rather than in preparing or producing such meats or products in an insanitary factory.

Now, reading into the Renovated Butter Act (32 Stat. 196) the sanitary provisions of the Meat Inspection Amendment (34 Stat. 676), it will be seen that the penalty provided in cases of the manufacture of process or renovated butter in insanitary factories is that the product of such factories shall not bear the Federal "Inspected and Passed" legend but, as such butter is not required to be so marked as a condition to being transported, or offered for transportation in interstate commerce, the penalty would seem to be entirely abortive as a means of regulating these factories.

It may be argued, of course, that the purpose of Congress in enacting the Act of May 9, 1902 (32 Stat. 196) was to bar from interstate commerce the products of insanitary renovated butter factories, using the machinery of the Meat Inspection Amend-

ment for that purpose, and that, therefore, these several acts, considered as one, prohibit the transportation, or offering for transportation lawfully in interstate commerce of the products of such factories, and subject any person so doing to the penalty prescribed by Section 18 of the Meat Inspection Amendment. In my opinion, the fault in this argument lies in that criminal statutes are strictly construed and can not be built up upon inference and conjecture, though, in a proper case, separate and distinct statutes may be construed together; provided that, when so taken together, they distinctly and clearly prohibit, and render unlawful the performance, or omission of some certain and particular act.

It is, therefore, my opinion that, while Congress has laid upon the Secretary of Agriculture the duty of causing sanitary inspections to be made of process or renovated butter factories, yet, for the reasons hereinbefore stated, it has not vested him with the power of enforcing a compliance on the part of the proprietors of such factories with such recommendations or regulations as he may make, or cause to be made for the better sanitation of the same.

It is true that the fifth section of the Act of May 9, 1902, known as the Renovated Butter Act, provides that:

> All process or renovated butter and the packages containing the same shall be marked with the words "Renovated Butter" or "Process But-

> ter" and by such other marks, labels, or words and in such manner as may be prescribed by the Secretary of Agriculture and no process or renovated butter shall be shipped or transported from its place of manufacture into any other State or Territory or the District of Columbia, or to any foreign country, until it has been marked as provided in this section;

and that any person who shall violate any of the provisions of that section shall be guilty of a misdemeanor. But this provision clearly relates solely to the marking, labeling, or branding of process or renovated butter for the purpose of identifying it as such. If, for instance, the Secretary of Agriculture could require, by regulation, that, as a condition precedent to the entry into interstate commerce of any process or renovated butter, it should bear the "U. S. Inspected and Passed," or other similar legend, and then, under the Meat Inspection Amendment, deny such marking to renovated butter which had not been prepared in a sanitary factory, he would be making that criminal which had not before been a violation of law and, thereby, in effect, exercising a legislative function which belongs exclusively to Congress.

The right of prescribing and promulgating regulations given to the Secretary of Agriculture under the Renovated Butter Act and the Meat Inspection Amendment, is the right of providing in detail the machinery for carrying into effect the provisions of

the Acts and not that of, by regulation, adding new provisions thereto. *United States v. Eaton*, 144 U. S. 677-687; *United States v. Hoover*, 133 Fed. 950-952.

Also Section 4 of the Act of May 9, 1902 (32 Stat. 196) provides:

> That every manufacturer of process or renovated butter * * * shall * * * conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require.

But the context of this section clearly indicates that it refers to surveillance for the purpose only of collecting the tax of ¼ of a cent per pound on renovated butter, as provided by the Act, for the manufacturer is required "to file such notices, inventories and bonds, and keep such books and render such returns of material and products, and to attach such signs and to affix such numbers of his factory and conduct his business under such surveillance, etc." as the Commissioner of Internal Revenue may by regulation require; the sanitary regulation of the factory being delegated entirely to the Secretary of Agriculture. *United States v. Eaton*, 144 U. S. 677-687.

In fact, the only effective control over these factories which is given to the Secretary of Agricul-

ture is to require the marking of the product so as to identify it as process or renovated butter, and to confiscate such quantities of the finished product of the factories as may be found to be deleterious to health or unwholesome. And the only control given the Commissioner of Internal Revenue is such as is necessary for the collection of the factory, and per pound taxes provided by the acts hereinbefore referred to.

In view of the foregoing, it is my opinion that the propositions stated in the sixth paragraph of the proposed letter to Mr. Charles M. Shank cannot be carried into effect; *and that there is no way, under existing law, whereby he can be compelled to improve the sanitary condition of his factory.*

If, however, it should be found that any material used at this factory in the manufacture of renovated butter renders any part of the finished product deleterious to health or unwholesome, such product may be confiscated by the Department under the provisions of the renovated butter Act (32 Stat., 196). And, if any part of the product of this factory is found to be adulterated or misbranded in violation of the Act of Congress of June 30, 1906 (34 Stat., 768), such product, when offered for transportation in interstate commerce, may be confiscated under Section 10 of that Act, and the manufacturer would also be amenable to prosecution under Section 2 thereof.

If the product is found not to conform to the provisions of either of these Acts, it is suggested that the facts and circumstances of such violations be reported to this office for such action as may be proper.

/s/ C. W. BOYLE,
Assistant Solicitor.

Inc.